No. 81-2375

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IN THE

Supreme Court of the United States

October Term, 1982

LAWRENCE J. EVANS JR.,

Appellant,

v.

STATE OF ARIZONA, EX REL. ARIZONA CORPORATION COMMISSION, ERNEST GARFIELD, B. L. "BUD" TIMS, and AL FARON, Commissioners and Members of the Arizona Corporation Commission,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF ARIZONA

(Motion for Rehearing Denied, March 8, 1982; Petition for Review by the Arizona Supreme Court Denied, March 30, 1982)

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

Fourteenth Amendment, United States Constitution

ONE. Whether a State Court of Appeals and a State Supreme Court may fail to address federal questions once "drawn in question" in both oral arguments and written briefs by refusing to address the merits, the arguments or the authorities cited?

TWO. Whether a State Court of Appeals and a State Supreme Court may fail to address federal questions once "drawn in question" and ruled upon by the lower court?

THREE. Whether a State Court of Appeals and a State Supreme Court may cite federal authorities that do not support in fact, discussion, argument, merits, dicta or holdings, the proposition that the State Court of Appeals and the State Supreme Court desire to establish?

FOUR. Whether a State Court of Appeals and a State Supreme Court may reverse a lower court holding on the basis that the lower court erroneously "weighed the evidence" and then reach a holding that the higher courts themselves are privileged to weigh the same evidence to reach an opposite conclusion?

FIVE. Whether a State Court of Appeals and a State Supreme Court can ignore a State statute (A.R.S. § 41-785(D)) allowing any one of five separate grounds for appeal; appeal being taken on all five separate grounds, then rule for reversal on one single ground alone–refusing to recognize or address the substance of each of the other four separate grounds?

SIX. Whether a State Court of Appeals and a State Supreme Court can reverse the judgment of the lower court,

which had all the records before it at the time of lower court judgment, when the Chief Judge of the three judge Court of Appeals orally admits to the parties at the opening of oral argument that "all records of this matter from the lower court have disappeared from the files of the Court of Appeals?"

SEVEN. Whether a State Court of Appeals and a State Supreme Court can reverse the judgment of the lower court, when the Chief Clerk of the Court of Appeals, during attempts to reconstruct the record from files of appellant herein, states to appellant "I have been ordered only to reproduce the motions which have been previously submitted by both parties" and then declines to reproduce a full record from records offered to him?

EIGHT. Whether a State Court of Appeals and a State Supreme Court can reverse the judgment of the lower court by giving the coloration of "reasonable evidence" to the uncorroborated, entirely rebutted, and impeached testimony of a witness who had been forced to resign from his position in State government for being a thief?

NINE. Whether a State Court of Appeals and a State Supreme Court can reverse the judgment of the lower court by giving the coloration of "reasonable evidence" to the testimony of a second witness who later repudiated his testimony on cross-examination?

TEN. Whether a State Court of Appeals and a State Supreme Court can reverse the judgment of the lower court on the basis of three sub-paragraphs of a statute (A.R.S. § 41-770) when no "standards" have ever been promulgated by the State of Arizona, the Arizona State Personnel Board, or the Arizona Corporation Commission for any of the three

sub-paragraphs; the lower court having found at least one of the sub-paragraphs as "unconstitutionally vague." (*i.e.*, "improper attitude")?

ELEVEN. Whether a State Court of Appeals and a State Supreme Court can reverse the judgment of the lower court on the basis of ethical conduct (A.R.S. § 41-770) when the State has previously failed to promulgate any "standards of ethical conduct" as required by A.R.S. § 41-783(23)?

TWELVE. Whether a State Court of Appeals and a State Supreme Court can reverse the judgment of the lower court absent a holding that the lower court has violated the very essence of a scheme of ordered liberty, or at the very least has acted in an arbitrary and capricious manner by a finding by the appellate courts that a preponderance of the evidence in the record was to the contrary?

THIRTEEN. Whether a State Court of Appeals and a State Supreme Court can reverse the judgment of the lower court based on a self-serving rule promulgated by a state administrative agency (*i.e.*, State Personnel Board) that was above and beyond the power granted to it by statute, and thus an *ultra vires act*?

FOURTEEN. Whether a State Court of Appeals and a State Supreme Court can reverse the judgment of the lower court, by a holding that once a politically appointed laymen board of an administrative agency has "delegated its power to a duly appointed hearing officer" under A.R.S. § 41-785 and/or § 41-782.01(C), that that politically appointed laymen board of an administrative agency can publish its own self promulgated internal rule to allow itself to change the findings of fact, conclusions of law and decision of that hearing officer, to make findings of fact, conclusions of law and a

decision, where there were no charges, allegations or corroborated, unrebutted and unimpeached testimony to support the desired findings of a politically appointed laymen board of an administrative agency.

FIFTEEN. Whether a State Court of Appeals and a State Supreme Court can reverse the judgment of the lower court based on an assumption on its part that there was "reasonable evidence" in the record to the contrary—then fail to state what constituted "reasonable evidence", and also fail to state what evidence they found which constituted "reasonable evidence"?

SIXTEEN. Whether a State Court of Appeals and a State Supreme Court can reverse the judgment of the lower court when all of the "Exhibits" in the matter were withheld by the Court of Appeals and not forwarded to the State Supreme Court with which to adjudge a petition for review; the petition for review then being denied by the State Supreme Court without consideration of the record?

SEVENTEEN. Whether a State Court of Appeals and a State Supreme Court can reverse the judgment of a lower court by relying upon U.S. Supreme Court cases that are not only distinguishable but contain no issue, dicta or holding in support of the holding of the State Court of Appeals and the State Supreme Court?

EIGHTEEN. Whether a State Court of Appeals and a State Supreme Court can reverse the judgment of a lower court when the lower court found that a Personnel Board's finding of fact that appellant having pursued his administrative remedies by the statutory appeal process did not constitute "insurbordination"?

NINETEEN. Whether a State Court of Appeals and a

State Supreme Court can reverse the judgment of the lower court in the light of any one or more of the preceding violations of the First and Fourteenth Amendments to the Constitution of the United States; but when a total of some 19 violations are presented then is not such a flagrant abuse of judicial power no less than arbitrary and capricious?

First Amendment, United States Constitution

ONE. Whether a State Court of Appeals and a State Supreme Court can find the admitted discussion by a citizen of matters of public record, when there is no prohibition by state statute or administrative rule of such, to constitute "improper attitude" under A.R.S. § 41-770?

PARTIES

The parties to this proceeding are those listed in the caption of the case in this Court.

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OPINIONS BELOW

The opinion of the original hearing officer in the matter appears in the appendix hereto, p. 1a, *infra*. The opinion of the "trier of fact" at the evidentiary hearing appears in the appendix hereto, p. 3a, *infra*. The opinion of the Arizona State Personnel Board appears in the appendix hereto, p. 20a, *infra*. The memorandum opinion and order of the Superior Court on appeal appears in the appendix hereto, p. 24a, *infra*. The final judgment of the Superior Court on appeal appears in the appendix hereto, p. 32a, *infra*. The opinion of the Arizona Court of Appeals appears in the appendix hereto, p. 36a, *infra*. The motion for rehearing by the Arizona Court of Appeals appears in the appendix hereto, p. 46a, *infra*. The denial of the motion for rehearing by the Arizona Court of Appeals appears in the appendix hereto, p. 77a, *infra*. The denial of the petition for review by the Arizona Supreme Court appears in the appendix hereto, p. 79a, *infra*. The mandate of the Arizona Court of Appeals to the superior court for its further action appears in the appendix hereto, p. 105a, *infra*. The final judgment of the superior court in response to the mandate of the Arizona Court of Appeals appears in the appendix hereto, p. 109a, *infra*. The notice of appeal to the Supreme Court of the United States appears in the appendix hereto, p. 111, *infra*.

JURISDICTION

The judgment of the Court of Appeals of Arizona reversing the judgment of the Superior Court, County of Maricopa, State of Arizona, below, was entered on March 8, 1982. A motion for rehearing was entertained and denied. See p. 77a, *infra*. A petition for review by the Supreme Court of Arizona was entertained and denied, See p. 79a, *infra*.

This appeal is being docketed in this Court within 90 days from the denial of petition for review by the Supreme Court of Arizona, below. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2).

JURISDICTIONAL STATEMENT

Lawrence J. Evans Jr., the Plaintiff, appeals from the final judgment of the Court of Appeals of the State of Arizona; Motion for Rehearing Denied, March 8, 1982; Petition for Review by the Supreme Court of Arizona Denied, March 30, 1982, as applied in this case, are not constitutional as being violative of appellant's right of free speech as guaranteed by the First Amendment of the Constitution of the United States; and as being violative of appellant's right of due process as guaranteed by the Fourteenth Amendment of the Constitution of the United States.

CONSTITUTIONAL PROVISIONS AND RULES

First Amendment, United States Constitution

Congress shall make no law. . .abridging the freedom of speech.

Fourteenth Amendment, United States Constitution

. . .No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .

Article II, Section 3, Constitution of the State of Arizona

The Constitution of the United States is the supreme law of the land.

Article II, Section 4, Constitution of the State of Arizona

No person shall be deprived of life, liberty, or property without due process of law.

Article II, Section 6, Constitution of the State of Arizona

Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right.

Title 41, Arizona Revised Statutes, § 41-770

Each of the following constitutes cause for discipline or dismissal of an employee in the state service:

* * *

4. Improper attitude

* * *

6. Insubordination

* * *

14. Willful disobedience

* * *

Title 41, Arizona Revised Statutes, § 41-783(23)

The rules of the personnel board shall include:

* * *

The establishment of standards of ethical conduct for employees.

Title 41, Arizona Revised Statutes, § 41-785(B)

The personnel board, or a duly appointed hearing officer, shall conduct the hearing. . . .

Title 41, Arizona Revised Statutes, § 41-782.01(C) Added by Laws 1978

The board may delegate its power to investigate complaints, hold hearings and issue orders pursuant to this section to its duly appointed hearing officer. . . .

Title 41, Arizona Revised Statutes, § 41-785(D)

. . .the employee may appeal to the superior court of the county of residence *on one or more* of the following grounds, that the order was:

1. Found on or contained error of law which shall specifically include error of construction or application of any pertinent rules.

2. Unsupported by any evidence as disclosed by the

entire record.

3. Materially affected by unlawful procedure.
4. Based on violation of any constitutional provision.
5. Arbitrary and capricious.

(Emphasis added.)

Title 41, Arizona Revised Statutes, § 41-1010(1)

". . .Neither the manner of conducting the hearing nor the failure to adhere to the rules of evidence required in judicial proceedings shall be grounds for reversing any administrative decision and order *providing the evidence supporting such decision or order is substantial*, reliable, and probative. . . ." (Emphasis added.)

RAISING THE FEDERAL QUESTION

At the earliest stage of the disciplinary proceedings below, federal questions were an integral part of the testimony received and the evidence introduced. The Hearing Officer, Judge Kopp, found for appellant. The politically appointed laymen Personnel Board disregarded in its entirety the findings of fact and conclusions of law of their own Hearing Officer to whom they had delegated their authority to conduct the hearing, and thereupon substituted its own findings of fact, conclusions of law and decision not based upon any charge, allegation, corroborated, unrebutted or unimpeached testimony or evidence in the record.

Upon appeal to the Superior Court of Arizona, the federal question was formally presented upon appeal as a violation of appellant's due process rights under the Fourteenth Amendment to the Constitution of the United States. Judge Charles L. Hardy (subsequently appointed Judge, Federal District Court, District of Arizona) found for appellant and found that so much of the statute as declared "improper attitude"

was unconstitutionally vague; and that the charges of "insubordination" and "willful disobedience" were not proven by the testimony and evidence submitted. The State of Arizona appealed.

Appellant again raised the federal question in Answering Brief to the Court of Appeals. The Court of Appeals failed to address the constitutional question, and reversed the Superior Court below. Appellant then filed a Motion for Rehearing enumerating therein some seventeen counts of violation of the plaintiff's rights of due process under the Fourteenth Amendment to the Constitution of the United States. The Court of Appeals summarily denied the Motion for Rehearing, without addressing one single count of violations of the federal question.

Appellant then filed a Petition for Review to the Supreme Court of Arizona, which consisted of the seventeen counts of violations of the federal questions being submitted to it by the Court of Appeals. The Supreme Court of Arizona also summarily denied the Petition for Review without addressing one single count of violations of the federal question.

STATEMENT OF THE CASE

On the 25th day of October, 1975 appellant had been directed not to utilize his title of Chief Hearing Officer or to exercise his supervisory responsibilities over his subordinates. However, he was carried on the books and records of the State of Arizona as Chief Hearing Officer and was paid as such through June 30, 1976, nine days after he was terminated. Also, his Job Title, Job Description and his position of Chief Hearing Officer was not reclassified until the 22nd day of June, 1976, one day after he was terminated.

On the 18th day of June 1976, without notice to or knowledge of the appellant, the then Executive Secretary, Donald E. Vance, in executive session, *in camera*, did make certain allegations to two of the three Commissioners, Ernest Garfield and B. L. "Bud" Tims. As a result of these allegations, *and without discussing them with appellant*, the two Commissioners did order the Executive Secretary, Donald E. Vance, to remove appellant ". . . on two counts: (1) Total insubordination, and (2) Attitude."

The appellant thereafter filed his timely notice of appeal contesting the three charges and six allegations as set forth by appellees in their termination letter of June 21, 1976.

The first Hearing Officer assigned the case found for appellant, the State of Arizona not being able to willing to proceed after one year and four months. See Appendix, p. 1a.

The trier of fact at the evidentiary hearing, Judge Ellis M. Kopp, reached the following two findings of fact:

> "1. That the Respondent [appellees herein] has failed to prove by a preponderance of the evidence the existence or validity of any of the six reasons for dismissing Appellant from state service as stated in the Dismissal Letter.
>
> 2. That the evidence did not establish that Appellant was guilty of willful disobedience, insubordination or had an improper attitude."

The trier of fact, Judge Ellis M. Kopp, reached the following single conclusion:

> "That Appellant did not violate the provisions of ARS 41-770 A. 4.6 14 and therefore should not have been dismissed by Respondent [appellee herein]."
>
> (See Appendix, p. 3a)

The Arizona State Personnel Board then rejected the trier

of fact's findings of fact, conclusions of law, and recommendation, and substituting therefor, its own findings of fact and conclusions of law. See Appendix, p. 20a).

Appellant immediately exercised his statutory right of appeal under the provisions of A.R.S. § 41-785 D, and filed his timely notice of appeal in the Superior Court of Maricopa County on all five statutory grounds allowable for an appeal.

On July 31, 1979 the Honorable Charles L. Hardy (subsequently appointed Judge, Federal District Court, District of Arizona) under the Arizona Rules of Civil Appellate Procedure, issued his MEMORANDUM OPINION AND ORDER (see Appendix, p. 24a) reversing the order of the Arizona State Personnel Board and remanding the case to the Personnel Board to determine the position to which the appellant should be reinstated and the amount of back pay that was owed to appellant. Appellant, in accordance with the Memorandum Opinion and Order, submitted a proposed final judgment. Appellee herein objected to the form and content of the proposed final judgment. Consequently, without unanimity of agreement between the litigants, the Judge issued his own Final Judgment. (See Appendix, p. 32a).

The oral arguments were heard by the Arizona Court of Appeals on October 5, 1981. The OPINION of the Arizona Court of Appeals was filed on February 2, 1982, reversing the lower court's judgment. A timely Motion for Rehearing submitting one violation of free speech and supplemented by sixteen further violations of due process and free speech, as violative of appellant's rights under the First and Fourteenth Amendments to the United States Constitution, was entered on February 11, 1982.

The Motion for Rehearing was summarily denied on March

8, 1982 without addressing any of the seventeen federal questions presented. A timely Petition for Review was filed with the Arizona Supreme Court on March 10, 1982. The Arizona Supreme Court also summarily denied the petition for review on March 30, 1982, without addressing any of the seventeen federal questions presented.

FACTS BEARING ON THE FEDERAL QUESTIONS PRESENTED

The judicial appellate reversal of a Superior Court reversal of a politically appointed administrative board of laymen which, without any corroborated, unrebutted, and unimpeached evidence in the record, *totally and completely* rejected *all* findings of fact of its statutorily authorized Hearing Officer to whom it had delegated its duties is the gravamen of the case or controversy. This politically appointed administrative board of laymen then substituted its own findings of fact for which there were no charges or allegations in the record, in order to reach unreasonable and unsupported conclusions of law so as to overrule its statutorily authorized Hearing Officer in whom an Arizona statute authorized that the Personnel Board's duties and responsibilities be delegated.

The facts are hereafter presented in concise form in chronological sequence to the federal questions presented. Some of the facts presented are similar or identical and may on their face appear repetitious, but the federal questions presented are dissimilar wherein the same facts apply to differing federal questions.

Article II, Section 3, Constitution of the State of Arizona states: "The Constitution of the United States is the supreme law of the land." By this constitutional edict all

questions of due process, freedom of speech and other constitutionally protected rights automatically become "federal questions" without having to be "drawn."

STATEMENT OF FACTS

ONE. Whereas it has been held that an administrative agency has the power to overrule the conclusions and recommended decision of its designated hearing officer, to whom it has delegated the authority and responsibility to conduct a fair and impartial hearing, *Anniston Mfg. Co. v. Davis*, 301 U.S. 337, 57 S. Ct. 816, 81 L. Ed. 1143, it is believed that this is a case of first instance wherein the administrative agency has rejected all of the findings of fact, conclusions of law and reached an opposite decision not based upon any charge, any allegation, any corroborated, unrebutted or unimpeached evidence in the record. A report which suppresses or omits testimony of such a character as might determine the result in a case is not a fair report and it operates as a denial of a fair hearing to one aggrieved by a decision based wholly on it. *Kwock Van Fat v. White*, 253 U.S. 454, 40 S. Ct. 566, 64 L. Ed. 1010. This is the gravamen of the offense when some seventeen federal questions have been "drawn in question" in both oral arguments and written briefs and both the Arizona Court of Appeals and the Arizona Supreme Court fail to address the merits, the arguments or the authorities cited.

TWO. We have here a situation wherein the lower court has addressed a "federal question" and has found a portion of a state statute "unconstitutionally vague." In a most arbitrary and capricious manner the Arizona Court of Appeals and the Arizona Supreme Court have not only reversed the lower court, *but did so without even addressing*

the merits of the federal question, the arguments presented, or the authorities cited.

This action being an event of such an unprecedented abuse of judicial discretion, appellant is unable to discover any federal citations wherein any other appellate court in any other jurisdiction has acted in a like dictatorial, arbitrary and capricious manner.

This action is not merely an error of law; it is an outright abuse of judicial discretion directly aimed at the constitutionally protected rights of a citizen.

THREE. An assignment of material prejudicial error in addition to the previous federal questions noted, *supra*, is that the Arizona Court of Appeals and the Arizona Supreme Court erroneously justified their holding by stating:

> "We find nothing constitutionally infirm in this procedure. The Personnel Board possesses no supervisory authority over the state employees whose appeals it hears and therefore satisfies the requirements of being a fair and impartial tribunal." See, *Perry v. Sinderman*, 408 U.S. 593 (1972); *Goldberg v. Kelly*, 397 U.S. 254 (1970).

A review of *Perry v. Sinderman* and of *Goldberg v. Kelly* reveals that no such issue was presented in either case; no dicta supplied; and no holding that an independent politically appointed board of laymen, because it possesses no supervisory authority over the state employees whose appeals it hears, therefore satisfies the requirements of being a fair and impartial tribunal. The Arizona Court of Appeals and the Arizona Supreme Court have herein made a reversible error of law.

FOUR. In civil cases the fact finder's duty is to weigh the evidence carefully and to find for the party in whose

favor it preponderates. *Ramsey v. United Mine Workers*, 401 U.S. 302, 91 S. Ct. 658, 28 L. Ed. 2d 64. In the instant case the "trier of fact", Judge Ellis M. Kopp, at the evidentiary hearing found that the preponderance of the evidence was not in favor of appellees and therefore held in favor of appellant. Again at the Superior Court level, Judge Charles L. Hardy (now Federal District Judge, District of Arizona), could not find a preponderance of the evidence in favor of appellees and therefore held in favor of appellant.

Of even greater weight is the fact that the Court of Appeals in its holding did not find a preponderance of the evidence in favor of appellees and quite incongruously "weighed the evidence" at this tertiary appellate level and held upon an ambiguous, undefined and considerably lesser degree that "reasonable evidence" was in the record to support the appellee's position. Without defining "reasonable evidence" and without citing what evidence constituted the "reasonable evidence" in the record, it reversed the lower court and substituted in its opinion the opinion of the Personnel Board. The Arizona Supreme Court refused to review this unprecedented judicial act.

FIVE. Appeal in this matter was taken, under the provisions of A.R.S. § 41-770, to the Arizona Personnel Board upon five separate grounds. The Arizona Court of Appeals and the Arizona Supreme Court addressed but one ground, and failed to address the evidence, arguments and authorities submitted on each and all of the other four separate grounds for appeal.

A finding without substantial evidence to support it is an arbitrary or capricious finding and does violence to the law. It is without the sanction of the authority conferred.

And an inquiry into the facts before the commission, in order to ascertain whether its findings are thus vitiated, belongs to the judicial province and does not trench upon or involve the exercise of administrative authority. *Federal Radio Commission v. Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 58 S. Ct. 627, 89 A.L.R. 406, 77 L. Ed. 1166.

"Substantial evidence", within the meaning of the provision of 5 U.S.C. § 1009(e)(5) that a reviewing court shall set aside agency action, findings, and conclusions found to be "unsupported by substantial evidence", must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury, and this is something less than the weight of the evidence. *Illinois Cent. R. Co. v. Norfolk & West. R. Co.*, 385 U.S. 57, 87 S. Ct. 255, 17 L. Ed. 2d 162.

Both the Arizona Court of Appeals and the Arizona Supreme Court failed to cite any "substantial evidence" that they could find that justified reversal of the other four separate grounds, or to the fifth separate ground of appeal.

SIX. A court may not overturn a determination made by an administrative agency upon a question committed to the agency's judgment *unless the determination is unsupported by substantial evidence, and the substantiality of the evidence must be measured through, and only after, an examination of the whole record.* (from separate opinion by Harlan and Stewart, J. J.) *Udall v. Federal Power Comm.*, 387 U.S. 428, 87 S. Ct. 1712, 18 L. Ed. 2d 869. (Emphasis added.)

It is respectfully submitted that neither the finder of fact at the evidentiary hearing, Judge Ellis M. Kopp, nor Judge Charles L. Hardy (subsequently appointed Judge, Federal District Court, District of Arizona) at the Superior Court

level could find substantial evidence, upon an examination of the whole record, to support the Personnel Board's findings.

Assuming that the Court of Appeals was able to partially reconstruct the record from below, there was no effort made to allow appellant to be assured that the complete record from the evidentiary hearing and the Personnel Board hearing, as well as the Superior Court hearing was completely reconstructed, or that some extraneous material had not since been entered by party or parties unknown.

Obviously, under such conditions a situation exists wherein there is a substantial question as of fairness and impartiality in the judicial review.

SEVEN. As in SIX, preceding, the United States Supreme Court has held that a judicial review of a determination made by an administrative agency can only be measured by a finding that there was substantial evidence to support the administrative agency's findings; and also only after an examination of the whole record. (from separate opinion by Harlan and Stewart, J. J.) *Udall v. Federal Power Comm.*, 387 U.S. 428, 87 S. Ct. 1712, 18 L. Ed. 2d 869.

Assuming that the Court of Appeals succeeded only in reconstructing "the motions which have been previously submitted by both parties to the Court of Appeals" then this obviously does not constitute the whole record.

It is respectfully submitted that both the finder of fact at the evidentiary hearing, Judge Ellis M. Kopp, and Judge Charles L. Hardy (subsequently appointed Judge, Federal District Court, District of Arizona) at the Superior Court level had the whole record before them when they both held that there was not substantial evidence in the record to

support the administrative agency's findings.

EIGHT. The record will reflect that the Executive Secretary, Donald E. Vance, was subsequently investigated by an Arizona Senate Special Investigating Committee and evidence was introduced that he had been defrauding the State of Arizona. This man, who was allowed to resign and seek employment in the private sector, was found by the "trier of fact" in the evidentiary hearing, Judge Ellis M. Kopp, as to not have sufficient credibility to outweigh contradicting testimony. This was so stated in Judge Kopp's findings of fact, conclusions of law and recommended order. The "trier of fact" is to determine which version of conflicting evidence is to prevail and weigh evidence accordingly. *Hickey v. Celebrezze*, 229 F. Supp. 5 (D. Okla. 1964). See Appellant's Notice of Service of First Set of Requests for Admissions and Non-Uniform Interrogatories, pages 74a (Exhibit 148), 75a (Exhibit 150), 77a (Exhibit 154B), 79a (Exhibit 158).

In addition, it has long been held that in equity a sworn answer called for under oath must be overcome by the testimony of at least two witnesses, or of one witness with corroborating circumstances. *Latta v. Kilbourn*, 14 S. Ct. 201, 150 U.S. 524, 37 L. Ed. 1169; *Vigel v. Hopp*, 104 U.S. 441, 26 L. Ed. 765; *May v. Sloan*, 101 U.S. 231, 25 L. Ed. 797.

The testimony of Mr. Donald E. Vance was completely rebutted, was entirely uncorroborated, and his reputation for truth and veracity was impeached. The sworn answer of appellant called for under oath was not overcome by the testimony of at least two witnesses, or of one witness with corroborating circumstances.

NINE. The record will reflect that the testimony of Andrew Bettwy Jr., quoted by appellees in their briefs, was repudiated by this witness upon cross-examination. He freely admitted upon cross-examination that the comment he recalled could have been made by another person and not by the appellant. (See Transcript, Vol. VIII, p. 96, lines 19-26). He also freely admitted upon cross-examination that his sole contact with appellant was "more or less seeing him and waving and saying: Hello, how are you?" (See Transcript, Vol. VIII, p. 99, lines 18-23).

In addition, it has long been held that in equity a sworn answer called for under oath must be overcome by the testimony of at least two witnesses, or of one witness with corroborating circumstances. (See citations in EIGHT, *supra.*) The testimony of Mr. Andrew Bettwy Jr. was completely rebutted, was entirely uncorroborated, and he repudiated said testimony upon cross-examination.

TEN. An act of the legislature, to have force and effect of a law, must be intelligibly expressed. *Baker v. Downey City Bd. of Ed.*, 307 F. Supp. 517 (D. Cal.), and statutes which are too vague to be intelligible are a nullity. *Weeds v. United States*, 41 S. Ct. 306, 255 U.S. 109, 65 L. Ed. 537 (N.Y.); *Boutilier v. Imm. and Natural. Svc.*, 87 S. Ct. 1563, 387 U.S. 118, 18 L. Ed. 2d 661 (N.Y.); *Barnett v. D'Artois*, 331 F. Supp. 1310 (D. La.).

Certainty being one of the prime requisites of a statute *Durbame v. State Tax Commission*, 65 Ariz. 268, 179 P.2d 252, 171 A.L.R. 684, a statute in order to be valid must be definite and certain. *Wallace v. Brewer*, 315 F. Supp. 431 (D. Ala.); *Hernandez v. Frohmiller*, 68 Ariz. 242, 204 P.2d 854.

A statute of uncertain meaning will not readily be made an instrument for much hardship and confusion. *Zellerbach Paper Co. v. Helvering*, 55 S. Ct. 127, 293 U.S. 172, 79 L. Ed. 264.

The term "improper attitude" being overly broad and unconstitutionally vague was found by the Superior Court below. In an administrative agency wherein the respective Commissioners are politically elected, the mere technicality of being registered with the opposite political party can be tantamount to "improper attitude." The failure of a state employee to contribute a sufficiently large enough sum to his politically elected Commissioner's campaign fund can be viewed as "improper attitude." This term, as used, is unconstitutionally vague and guilty of overbreadth, and was so found by the Superior Court below. The statute not being narrowly drawn, and there having been no "standards" promulgated by the State of Arizona, as required by Title 41, Arizona Revised Statutes, § 41-783(23), or by the Arizona Corporation Commission by internal rules, it is submitted that it is impossible to define this term with definiteness and certainty.

Reasonable definiteness and certainty is required in statutes, *Hunter v. Allen*, 422 F.2d 1158 (C.A. Ga.), *reversed on other grounds*, 91 S. Ct. 1237, 401 U.S. 989, 28 L. Ed. 528, *mand. conf. to* 443 F.2d 1359; *Whitfield v. Simpson*, 312 F. Supp. 889 (D. Ill.); *State v. Starsky*, 106 Ariz. 329, 475 P.2d 943.

When so much of A.R.S. § 41-770 reads "improper attitude" is so imperfect as to render it impossible to execute it or to ascertain the legislative intent, then that part of the statute is a nullity. The term "improper attitude" is capable

of being molded into whatever shape the employer desires, varying it at will according to the circumstances of the moment.

Being subjected to the vicissitudes of the whims of the moment rather than to the objective and clearly defined parameters of acceptable conduct, is a clear and abusive violation of appellant's rights of due process under the Fourteenth Amendment to the Constitution of the United States.

ELEVEN. The United States Supreme Court has long held that requisite "standards" must be promulgated to permit any statute or law to escape constitutional infirmity for "vagueness." *Zwickler v. Koota*, 88 S. Ct. 391, 389 U.S. 241, 19 L. Ed. 2d 444, *on remand* 290 F. Supp. 244, *reversed; Golden v. Zwickler*, 89 S. Ct. 956, 394 U.S. 103, 22 L. Ed. 2d 113; *American Comm. Assn. C.I.O. v. Douds*, 70 S. Ct. 674, 339 U.S. 382, 94 L. Ed. 925, *rehearing denied*, 78 S. Ct. 1017, two cases, 339 U.S. 990, 94 L. Ed. 1391.

The "standards test" has been best judicially delineated by a state supreme Court in *Westervelt v. Natural Resources Commission*, 420 Mich. 410, 263 N.W.2d 564, 575, wherein it was held:

> "At present, the applicable test for determining whether legislation contains an unconstitutional delegation of legislative power is the 'standards test'; under the 'standards test', which is rooted in the constitutional doctrines of due process and separation of powers, legislation delegating power to an administrative agency must contain either explicitly or by reference standards to prescribe for guidance which are as reasonably precise as the subject matter of the legislation requires or permits."

Arizona Revised Statutes, § 41-783(23) requires that the

Personnel Board shall establish "standards" of ethical conduct for employees. Said "standards" were never established by the Personnel Board, nor were any "standards" promulgated by the Arizona Corporation Commission.

TWELVE. The Arizona Court of Appeals and the Arizona Supreme Court did not hold that a preponderance of the evidence in the record was to the contrary of the holding of the Superior Court below. In civil cases the fact finder's duty is to weigh the evidence carefully and to find for the party in whose favor it preponderates. *Ramsey v. United Mine Workers*, 91 S. Ct. 65, 401 U.S. 302, 28 L. Ed. 2d 64.

In general, it may be said that the proceedings in a trial court should be upheld unless they violate the very essence of a scheme of ordered liberty. *Fitzgibbons v. Hancock*, 97 N.H. 162, 82 A.2d 769; C.J.S. 16A, § 567, pp. 541-42. The opinion of the Court of Appeals and of the Arizona Supreme Court does not indicate a "violation of a scheme of ordered liberty" by either Judge Ellis M. Kopp at the evidentiary hearing or by Judge Charles L. Hardy (since appointed Judge, Federal District Court, District of Arizona) at the Superior Court judicial review appellate proceedings.

In the evidentiary hearing held the "trier of fact", Judge Ellis M. Kopp, did not find any preponderance of evidence for the appellees and ruled in favor of the appellant. The Arizona Personnel Board in its review did not find any preponderance of evidence for the appellees but reversed the trier of fact, substituting in its order findings of fact not based upon any charge, any allegation, any corroborated evidence or testimony, any unrebutted evidence or testimony, and upon impeached testimony.

The Superior Court in its review did not find any

preponderance of evidence for the appellees in the record and reversed the order of the Personnel Board.

THIRTEEN. Although generally speaking "ultra vires" acts have been restricted to corporation actions in excess of the express or implied powers of the corporation's charter, the courts have addressed the same limitations upon administrative agencies and upon municipal corporations. (Citations omitted.)

The formulation of an internal rule or regulation by the state personnel board giving itself the power to reject *all* findings of fact made by the "trier of fact", to whom it has delegated its powers, duties and responsibilities under the authority of A.R.S. § 41-785(B) and A.R.S. § 41-782.01(C), is in and of itself an "ultra vires" act. The powers that the Personnel Board has promulgated for itself by its own internally promulgated rule or regulation are beyond those granted by statute.

The position of the appellant is legally defined and argued definitively in Appendix N of Appellant's [Appellee below] Answering Brief by Amicus Curiae, referred to on page 65a, Appellant's Motion for Rehearing.

FOURTEEN. Rules and regulations of a public administrative agency duly promulgated and adopted in pursuance of properly delegated authority have the force and effect of law where they are legislative in character, but rules and regulations which are merely executive or administrative views as to the meaning and construction of the statute are not controlling on the courts. *Cory Corporation v. Sauber*, 266 F.2d 58, 61 (C.A. Ill.), *rehearing denied*, 267 F.2d 802, *reversed on other grounds*, 80 S. Ct. 1331, 363 U.S. 709, 4 L. Ed. 2d 1508, and cannot alter or extend the plain meaning of a statute. *American Trucking Associations v. Atchison*,

T. & S.F. Ry. Co., 87 S. Ct. 1608, 387 U.S. 397, 18 L. Ed. 2d 847 (Ill.), *rehearing denied*, 88 S. Ct. 11, 389 U.S. 889, 19 L. Ed. 2d 197 and 88 S. Ct. 12, two cases, 389 U.S. 889, 19 L. Ed. 2d 197.

The Supreme Court of Arizona has held in *Dennis v. Jordan*, 71 Ariz. 430, 229 P.2d 692, that:

> "In the recent case of *Haggard v. Industrial Commission of Arizona*, 71 Ariz. 91, 223 P.2d 915, 921, we recognized that the ordinary rule is that legislative powers cannot be delegated to administrative bodies but point our: * * * * this does not mean that when authorized to do so by the act itself administrative bodies may not make rules and regulations *supplementing* legislation for its complete operation and enforcement, *if such rules and regulations are within the standards set forth in the act of the legislature.*" (Emphasis supplied by the Court.)

By the Personnel Board having promulgated an internal rule or regulation giving itself the power to change the findings of fact of its own Hearing Officer, who took the evidence in the absence of the Personnel Board, in whom the Legislature has granted only the power to "delegate its powers to investigate complaints, hold hearings and issue orders pursuant to this section. . . ." (See A.R.S. § 41-785 (B) and see A.R.S. § 41-782.01(C)) it has gone beyond the standards set forth by the Legislature. Thus its order is a nullity. So should the Arizona Court of Appeals and Arizona Supreme Court have held.

FIFTEEN. The Administrative Procedure Act of Arizona is quite specific and unambiguous. In A.R.S. § 41-1010(1) it states:

> ". . . Neither the manner of conducting the hearing nor the failure to adhere to the rules of evidence required in judicial proceedings shall be grounds for reversing any

> administrative decision and order *providing the evidence supporting such decision or order is substantial, reliable, and probative. . . .*" (Emphasis added.)

The Administrative Procedure Act of the United States government is equally specific and unambiguous. In U.S. Code, Chapter 5, § 556(d) it states:

> ". . . A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and *substantial evidence. . . .*" (Emphasis added.)

It is clear in the record that the "trier of fact", Judge Ellis M. Kopp, did not find any substantial evidence in the evidentiary hearing. It is equally clear that the Superior Court, Judge Charles L. Hardy presiding, did not find any substantial evidence in the judicial review of the administrative decision. It is also equally clear that the Arizona Court of Appeals and the Arizona Supreme Court did not find any substantial evidence in their appellate review; but, instead, came to a holding that a lesser degree of evidence, that of "reasonable evidence" was sufficient to reverse the decision of the lower court, contravening existent legislative law and existent case law thoroughly briefed in Appellant's Motion for Rehearing filed with the Arizona Court of Appeals. (See Appendix, p. 46a.)

The federal courts have held that the "trier of fact," in this case Judge Ellis M. Kopp, is the only one to determine which version of conflicting evidence is to prevail. *Hickey v. Celebrezze*, 229 F. Supp. 5 (D. Okla. 1964).

Even when by statute an administrative agency is not bound by the rules of evidence, and even though the agency may in its discretion accept any evidence that is offered,

there must nevertheless be a residuum of legal evidence to support the determination made by the agency. *U.S. ex rel. Dong Wing Ott v. Shaughnessy,* 116 F. Supp. 745 (D.N.Y. 1953).

To reach a finding of fact, a conclusion of law and a reversal of the lower court on the grounds of a lesser degree of evidence; then not to define the lesser degree of evidence; then not to specify of what that lesser degree of evidence consisted; and to do this after the conclusion of the submission of all briefs and motions precluded appellant herein of the basic rudiments of a fair and impartial appellate review, constitutes an unfairness of sufficient substance to constitute a real and substantial controversy as to the effect of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

The United States Supreme Court has held that where the findings of an administrative board "*are supported by substantial evidence*" they must be accepted. (Emphasis added.) *National Labor Relations Board v. Brown,* 380 U.S. 278, 85 S. Ct. 980, 13 L. Ed. 2d 839; *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 85 S. Ct. 1012, 380 U.S. 359, 13 L. Ed. 2d 895.

The appellant herein included in briefs to the Superior Court and to the Arizona Court of Appeals and the Arizona Supreme Court, and in particular in his motion for rehearing, statements in legal and logical form which averred a dispute or controversy as to the effect of the due process clause of the Fourteenth Amendment to the Constitution of the United States, upon the determination of which the result depended. None were addressed by either the Arizona Court of Appeals or the Arizona Supreme Court.

SIXTEEN. Included in the appendix hereto at p. 103a, is

a copy of the letter of transmittal from the Arizona Court of Appeals to the Arizona Supreme Court, indicating therein that all Exhibits in the record below were withheld ". . .pending disposition of Arizona Supreme Court."

The United States Supreme Court has held in *Goldberg v. Kelly*, 397 U.S. 254 (1970) that:

> ". . . the decision maker should state the reasons for his determination and indicate the evidence he relied on, cf. *Wichita R. & Light Co. v. PUC*, 260 U.S. 48, 57-59 (1922), though his statement need not amount to a full opinion or even formal findings of fact and conclusions of law."

The Exhibits withheld from the Arizona Supreme Court included, among other vital items of evidence:

EXHIBIT B. That appellant could not possibly have had the required opportunity to sign the PDQ in the period of time indicated–he having been terminated prior to this time.

EXHIBIT E. That appellant was carried on the rolls of the State of Arizona as Chief Hearing Officer and paid as such up until the time of his termination–therefore, he could not be guilty of falsely saying that he was Chief Hearing Officer.

EXHIBIT F. That an employee of the Arizona Corporation Commission was induced by duress and threats of both job security and the vesting of his pension rights if he did not write a memorandum unfavorable to appellant, for the use of the Commission to justify the termination of appellant.

EXHIBIT H. That appellant's adaptability, cooperation, dependability, punctuality, ambition, initiative, self-discipline, judgment, integrity, professionalism, decisiveness, understanding, respect and confidence of fellow employees,

ingenuity, appearance, willingness to accept and act upon suggestions and constructive criticism, etc., were rated in document form by the Arizona Corporation Commission as either "exceptional performance" or "exceeded standards in most objectives" during this period.

EXHIBIT O. That appellant's position was never downgraded from Chief Hearing Officer until June 22, 1976—one day *after* he was terminated.

EXHIBIT P. That the problems of the Commission were public knowledge as expressed in the media.

EXHIBIT T. That the Chairman of the Arizona Corporation Commission at the time publicly announced to the press: "There's nothing that we do or say that should be kept from the public anyway. It's the public business—they pay for it."

SEVENTEEN. An assignment of material prejudicial error in addition to the previous federal question noted, *supra*, is that the Arizona Court of Appeals and the Arizona Supreme Court erroneously justified their holding by stating:

> "We find nothing constitutionally infirm in this procedure. The Personnel Board possesses no supervisory authority over the state employees whose appeals it hears and therefore satisfies the requirements of being a fair and impartial tribunal." See, *Perry v. Sinderman*, 408 U.S. 593 (1972); *Goldberg v. Kelly*, 397 U.S. 254 (1970).

A review of *Perry v. Sinderman* and *Goldberg v. Kelly* reveals that no such issue was presented in either case; no dicta supplied; and on holding that an independent politically appointed board of laymen, because it possesses no supervisory authority over the state employees whose appeals it hears, therefore satisfies the requirements of being a fair and

impartial tribunal. The Arizona Court of Appeals and the Arizona Supreme Court have herein made a reversible error of law.

By the Arizona Court of Appeals and the Arizona Supreme Court relying upon not only distinguishable cases, but cases which are completely and utterly not in support of its presumption, it has acted in an arbitrary and capricious manner.

EIGHTEEN. An absolutely amazing finding of fact made by the Personnel Board (Finding of Fact No. 2) and given the coloration of approval by the Arizona Court of Appeals and the Arizona Supreme Court was that:

> "in papers filed by the Appellant *subsequent to the hearing* he has continued to argue that the Hearing Officer in Tucson is illegal, thus criticising the Commissioners in the performance of their management prerogatives." (Emphasis added.)

and from this reached a Conclusion of Law (Conclusion of Law No. 2):

> "That Appellant's *continued reference* to the illegal Hearing Officer in Tucson * * * constituted insubordination under A.R.S. § 41-770." (Emphasis added.)

This was a violation of appellant's due process rights under the Fourteenth Amendment to the Constitution of the United States, and also of his statutory rights to pursue his administrative remedies. This was akin to saying: "You were accused of an act, your denial or explanation of that act in the hearings and in the briefs required to be submitted after the hearings constitutes insubordination."

By this decision, conclusive on its face, the Arizona Court of Appeals and the Arizona Supreme Court have decreed the the death of an individual citizen's rights to pursue his administrative remedies and to receive a fair and impartial

appellate judicial review in the State of Arizona.

NINETEEN. The general meaning of "arbitrary and capricious" is, "with not *substantial* evidence to support it", and "conclusion contrary to *substantial* competent evidence." *East Tex. Motor Freight Lines v. U.S.*, 96 F. Supp. 424, 427 (D. Tex.) (emphasis added); *In re Rogers*, 47 F. Supp. 265, 266 (D. Tex.) (emphasis added).

When a total of more than 17 errors involving federal questions properly drawn, involving violations of due process under the Fourteenth Amendment to the Constitution of the United States and involving a violation of the right of free speech under the First Amendment to the Constitution of the United States, are presented to a state court of appeals in a Motion for Rehearing and that state court of appeals peremptorily denies the motion for rehearing without addressing a single question or a single authority; and when a state supreme court peremptorily denies a petition to review the same more than 17 errors involving federal questions properly drawn; then the inference, the implication and the assumption must be clearly drawn- this was an arbitrary and capricious abuse of judicial power.

First Amendment, United States Constitution

ONE. Regulatory measures, no matter how sophisticated, cannot be employed in purpose or in effect to stifle, penalize, or curb the exercise of rights guaranteed by the First Amendment. *Louisiana ex rel. Gremillion v. Nat. Assoc. for Adv. of Colored People*, 81 S. Ct. 1333, 366 U.S. 293, 6 L. Ed. 2d 301. Freedom of speech and freedom of the press are properly classed as fundamental personal rights and liberties, since they lie at the foundation of free government by free men. *Schneider v. Irvington*, 60 S. Ct. 146, 308 U.S.

147, 84 L. Ed. 155.

The depth and absurdity of the Personnel Board's finding of fact No. 4 was given the seal of approval by the Arizona Court of Appeals on page 6 of the Court of Appeals opinion, to-wit:

> "That Appellant by his own admission discussed Commission business with outside parties other than legal counsel." (See Appendix, p. 41a.)

There is no known prohibition of law, nor has there ever been one to prohibit discussing matters of public record, or of that which has been published in the press.

The Arizona Court of Appeals opinion gives further seal of approval to this absurd conclusion of law No. 4, which the Personnel Board derived from such an unlawful finding of fact as described above, by its finding that there was "reasonable evidence" to support such a Personnel Board opinion and order.

In a press release issued by the then Chairman of the Arizona Corporation Commission, Ernest Garfield, and printed in the *Phoenix Gazette*, dated April 14th, 1976 (Vol. VI, p. 98, lines 9-26; p. 99, lines 1-2) and in Exhibit T, the Appellees have admitted the falsity of this charge, to-wit:

> "Garfield said, he wasn't much concerned whether there were bugs in his office or not; *there's nothing we do or say that should be kept from the public anyway. It's the public business.* They pay for it." (Emphasis added.)

This unconscionable granting of the coloration of credibility and the force and effect of law to an unreasonable finding of fact and conclusion of law introduced by the politically appointed laymen Personnel Board constitutes a gross violation of appellant's constitutional rights of due

process under the Fourteenth Amendment to the Constitution of the United States, and also to appellant's constitutional rights of free speech under the First Amendment to the Constitution of the United States.

THE QUESTION IS SUBSTANTIAL

The question as to the Fourteenth Amendment implications of a State Court of Appeals and State Supreme Court violating the due process property rights of a citizen by totally ignoring them strikes at the very heart of the American judicial system. Although often addressed in criminal actions and sometimes in civil actions, the gravamen of the violation is usually directed to a subdivision of the executive department of a State government. It is the belief of the Appellant herein that gross violations of the Fourteenth Amendment and First Amendment rights of a citizen by the judicial department of the State government have never been treated before by this Court.

The judiciary of our State governments must be as circumspect as "Caeser's wife." Violations as simple error have been excused in the past. But no known such cumulative and flagrant violations of a citizen's rights under the Constitution of the United States, and, indeed, under the Constitution of the State of Arizona by the appellate judiciary therein has been discovered by Appellant.

It is respectfully submitted that appellate courts must observe the same inherent constitutional rights of a citizen as do the trial courts. To refuse to recognize properly drawn federal questions by totally ignoring them without reaching one single argument on the merits, by totally ignoring U. S. Supreme Court holdings, by citing U. S. Supreme Court

holdings that are not only distinguishable but completely inapposite to a finding of fact and conclusion of law reached by the appellate court, to reverse a lower court which had the entire record before it while the appellate court admitted in open court that "all of the records in this matter have disappeared from the Court of Appeals," to refuse to accept an offer by appellant to reconstruct the record from his files by an order to the Chief Clerk of the Court of Appeals to reconstruct only the Motions which its records indicated had been previously filed—then not to rule on one single Motion, and to give the coloration of credibility to uncorroborated, completely rebutted and impeached evidence, can only be said to be so arbitrary and capricious as to create a "substantial question" before the Supreme Court of the United States.

CONCLUSION

For these reasons this Court should note jurisdiction of this appeal.

Respectfully submitted,

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